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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. [redacted] 257

GENERAL METAL PRODUCTS COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Sixth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit.

Petitioner, General Metal Products Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on April 11, 1969.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, printed in the Appendix attached hereto, has not yet been officially reported (Appendix B).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 11, 1969. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1).

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151 *et seq.*), are set out in the Appendix attached hereto (Appendix A).

QUESTIONS PRESENTED.

1. Whether the Petitioner is responsible for the actions of five Humboldt, Tennessee, townspeople who were neither employees nor managers of the Petitioner and guilty of unfair labor practices by reason of the actions of said townspeople?

2. Whether statements made by five Humboldt, Tennessee, townspeople were coercive and violative of Section 8 (a) (1) of the National Labor Relations Act where the employees themselves to whom the statements were made were not coerced?

STATEMENT.

General Metal Products Company, the Petitioner herein, has operated a plant in St. Louis, Missouri, since January 24, 1889 (J. A. 115a). The St. Louis plant has been organized by the International Association of Machinists and Aerospace Workers, AFL-CIO, since 1941 (J. A. 101a). During the more than 25 years of organization by the Union at the St. Louis plant, relations between the Company and the Union have been excellent (J. A. 112a).

When the Petitioner became aware that its markets were moving southward and it faced the potential loss of at least a half million dollars worth of business, it decided that, rather than continue to expand the St. Louis facilities, which were nearing the expansion limit, it would be best to follow the markets that were moving south and create an operation which could be greatly expanded to take advantage of the new markets (J. A. 102a). Humboldt, Tennessee, was selected as the site of the new operation, mainly through negotiations with J. Frank Warmath, a local attorney and a member of the local and State Industrial Development Commission. Prior to any contractual obligation, however, the Petitioner met with the Union's business representative and shop committee in St. Louis and received the Union's blessing in pursuing its new venture (J. A. 101a-103a). Approximately $100,000.00 was expended by the Company in building improvements alone, and its investment for land, building and equipment as of the early part of 1966 was $846,000.00. In addition thereto, costly machinery has continued to be placed in the plant, $35,000.00 to $36,000.00 alone for two pieces of equipment (J. A. 117a-119a). The lease which has no cancellation or escape clause extends to the year 2000 in renewal and purchase options in increments of ten years after 1980 (J. A. 127a).

The Petitioner's president Ralph Mattick initially consulted with Warmath as to the adequacy and source of supply of labor and services of transportation for shipment of Petitioner's goods to the southeast and ultimately to the southwest (J. A. 99a). The business dealings between Mattick and Warmath resulted in a warm friendship; and after negotiations for the property had been completed, on occasions when Mattick along with other of the Petitioner's officials were in Humboldt they met socially with Warmath at dinner, cocktail parties, or for a drink (J. A. 65a, 97a). Warmath never at any time represented the Petitioner and did not maintain any interest in the Humboldt plant or its facilities (J. A. 87a).

On January 25, 1966, the Union filed a petition for a representation election among employees of the Petitioner's Humboldt plant. Pursuant to a stipulation for certification upon consent election executed by the parties on February 8, 1966, in the offices of the National Labor Relations Board in Memphis, Tennessee, an election was scheduled for February 18, 1966 (J. A. 98a). While Warmath accompanied certain of the Petitioner's officials to Memphis, it was merely as a friend and not as a representative of the Petitioner which was represented by its attorney, Mr. Carroll C. Gilpin (J. A. 96a-97a). No employees of the Petitioner were present in Memphis at the time the election was scheduled.

Prior to the election on February 18, 1966, several citizens who were neither employees nor managers of the Petitioner, because of their interest in Humboldt (e. g., J. A. 55a, 90a, 105a), and because of the labor violence taking place in Paris, Tennessee, fifty miles from Humboldt, in which the same Union that was attempting to organize the Petitioner was engaging in "goon squad" tactics and "shooting and firing pellets" (J. A. 67a), dis-

cussed the union situation with several employees of the Company. No Company official asked or encouraged any citizen to talk to any employee. Nor was any Company official aware that any employee had been talked to by a citizen (J. A. 100a, 119a). Warmath talked to employee Danny Porter; attorney G. Griffin Boyte and banker Dossie Ray Blankenship spoke to employee Vernon Bolin; city alderman Annie Lou Cox and businessman Robert L. White contacted employee Terry Stevens; grocer Otis Milligan conversed with employee Jack Cross;[1] and grocer Larry Thomas Mills spoke to employee James Crit Sanders, Jr. Boyte, Cox, and White were business associates[2] of Warmath, while Milligan was only a friend. Blankenship and Mills had no business connection with Warmath, nor were they his friends.

Based upon the statements of the seven townspeople and portions of a speech of Company president Mattick and a statement of plant superintendent Ray Stevens to an employee, a complaint was filed against the Petitioner by the National Labor Relations Board, and an unfair labor practice hearing was held on August 10 and 11, 1966. A Trial Examiner of the Board found that the Petitioner violated Section 8 (a) (1) of the National Labor Relations Act. A copy of the Trial Examiner's Decision is printed in the Appendix attached hereto. The Trial Examiner determined that citizens Warmath, Boyte, Cox, White and Milligan were agents of the Company and consequently the Company was responsible for their actions which were found to be coercive.[3] The Petitioner

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[1] Cox spoke to Cross' wife, but not to Cross.

[2] Boyte was a law partner of Warmath, although they did not share the same offices. Cox worked in Warmath's bank. White was in the real estate business with Warmath.

[3] The Trial Examiner did not find that citizens Mills and Blankenship were agents of the Company, although he determined that Mills told employee Sanders that if the Union came

filed timely exceptions to the Trial Examiner's Decision, and the Board issued its Decision and Order on April 18, 1967, in which it basically affirmed the findings of the Trial Examiner. The Board's Decision and Order is printed in the Appendix attached hereto. The Board filed its petition for enforcement, and the matter was heard before the United States Court of Appeals for the Sixth Circuit on December 3, 1968, and the judgment of the Court of Appeals was rendered on April 11, 1969. The Court of Appeals held that the conduct of the five citizens was imputed to the Company, using as a basis, supposition, surmise, and inaccuracies, and that the conduct was coercive.[4]

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into the plant that the Company would close and Sanders would lose his job and it would be hard for him to find work (App. p. A-28, footnote 14), and that Blankenship asked employee Bolin how he felt about the Union and why the men were so strong about the Union and that, like the Humboldt Hosiery Mill, the Company might close and the employees lose jobs if the Union were successful (App. p. A-28, footnote 14).

[4] The Court of Appeals did not hold that the speech of president Mattick or the statement by plant superintendent Stevens constituted violations of the Act (App. p. A-8). Thus in this case the Petitioner's officials and supervisors engaged in no coercive conduct.

REASONS FOR GRANTING THE WRIT.

1. The instant case is one where a court of appeals has rendered a decision in conflict with the decision of another court of appeals and, in addition, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The Court of Appeals ruled that the Petitioner violated Section 8 (a) (1) of the National Labor Relations Act because of coercive statements made to four employees by five Humboldt, Tennessee, townspeople who were neither employees nor managers, but who were determined agents of the Petitioner, although the Petitioner never asked or encouraged these townspeople to take any action and was never aware of what they had done. This holding represents a monumental departure from legal precedent carefully set out in the agency cases of other circuits and such a determination sans guidance by this Court will have a deleterious effect upon all future cases where townspeople on their own volition and unbeknownst to the employer make statements to employees during an election campaign and are held to be agents of the employer on supposition and surmise rather than on factual evidence in an adversary proceeding.

There is no doubt that in determining responsibility for union activities the principles of agency and its establishment are to be liberally construed. **International Association of Machinists; Tool and Die Makers Lodge No. 35, etc. v. Labor Board**, 311 U. S. 72 (1940). Decisions of other courts of appeal are unanimous, however, in their determination of agency that before an employer may be found to have engaged in unfair labor practices by reason of activities on the part of persons not in its employ or

management and whom it did not clothe with the apparent authority to act for it, the employer must have acquired knowledge of the activities for which it is sought to be charged and the circumstances must be such as to place the employer under an obligation to disavow such activities. **The Colson Corporation v. N. L. R. B.**, 347 F. 2d 128 (C. A. 8, 1965), cert. denied 382 U. S. 904. **Amalgamated Clothing Workers v. N. L. R. B.**, 371 F. 2d 740 (C. A. D. C. 1966). In both **Colson**, supra, and **Amalgamated Clothing Workers**, supra, there was no doubt that the employers had explicit knowledge of the actions of the businessmen who as members of organized local committees were directly involved in the employers' daily affairs, as well as acting in open concert during the organizational campaigns. Even in the case cited by the Court of Appeals in the instant case as authority for holding the Petitioner responsible for the actions of the townspeople, **N. L. R. B. v. Lake Butler Apparel Co.**, 392 F. 2d 76 (C. A. 5, 1968), the members of the local committee owned the land and plant facilities of and lent money to the employer, the employer furnished the members with an employee mailing list specifically so that they could contact the employees, and the employer **knew** that the members were contacting employees to warn them about the union and did nothing to repudiate or disavow their acts.

In the instant case, to hold the Petitioner responsible for the acts of the townspeople would be to emasculate completely even a liberally construed concept of agency. This case has no unfair labor practices committed by the Petitioner's officials or supervisors. This case has no organized local committee to aid in the defeat of the Union. This case has no concerted campaign to have local citizenry talk to the Petitioner's employees. This case has no radio or newspaper editorials calling for the defeat of the Union. This case does have only **five** townspeople acting independently and having short personal or telephone con-

versations with **four** employees—a far, far cry from the usual anti-organizational situations as set out so fully in **Colson, Amalgamated Clothing Workers,** and **Lake Butler,** supra.

There is no doubt that the Petitioner did not ask any citizen to speak to any employee, and also there is no doubt that the Petitioner did not clothe any citizen with authority to speak for it. Consequently, the Court was forced to premise its decision on the fact that the Petitioner acquired knowledge and failed to disavow. This knowledge was miraculously imputed to the Petitioner through Warmath's social contacts with the Petitioner's officials and then supplemented by Warmath's business connections with the four citizens, not upon the evidence in the record, and that the Petitioner's acquiescence was construed as approval.[5] The record is clear that the Petitioner **never** asked, intimated or encouraged any citizen, including Warmath, to contact any employee, and the record is equally clear that the citizens' actions were entirely their own and they were neither instructed to talk to any employees nor did they report their conversations with the employees to anyone[6] (5a, 119a-121a). Such is their

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[5] To base responsibility of the Petitioner for the acts of the citizens, the Court referred to the facts that Warmath enlisted the aid of his business associates, that he was part owner of the land on which the plant was located, that he obtained the names of the employees from Company officials, that Company officials knew he had talked to certain employees, and that Warmath visited the plant on numerous occasions. The record clearly indicates that Warmath never enlisted the aid of his business associates (J. A. 85a, 86a), from the time the plant was purchased by the Petitioner Warmath owned no part of the plant or the land on which it was situated (J. A. 117a), the list of names Warmath received was given him for a city election in November 1965, which was prior to any attempts at organization by the Union (J. A. 114a), Company officials did not know Warmath talked to certain employees (J. A. 119a), and Warmath did not visit the plant on numerous occasions (J. A. 76a).

[6] Milligan did report his conversation with employee Cross to Warmath, but neither Milligan nor Warmath ever so advised the Petitioner.

testimony. Warmath, Boyte, Cox, and White each testified without contradiction that they were not instructed or asked by the Company or anyone else to contact any employee, that what they said and did was of their own doing, and that they never reported their conversations to the Company or anyone else (J. A. 56a, 62a, 107a). While Milligan was never asked by the Company or anyone else to contact any employee, Warmath did ask Milligan to find out what the problems were (J. A. 93a). On their part Cox, White, Milligan, and Boyte testified, again without contradiction, that Warmath in particular never instructed or asked them to talk to any employee, and Warmath himself testified that he never told Cox, White, Milligan, or Boyte to contact any employee[7] (J. A. 85a, 86a). Under such circumstances it was impossible for the Petitioner to have had knowledge of the actions of the citizens, and lacking such knowledge was under no duty to disavow.[8]

The Court of Appeals also placed weight upon a fact that the conversations of the townspeople followed a specific pattern. Such reliance to show something of a conspiracy among Warmath and his associates is implausible, for the conversations of citizens Mills and Blankenship, who were found not to have been agents of the Petitioner by the Trial Examiner,[9] followed somewhat that of the other citizens and were perhaps more explicit. To attach responsibility to the Petitioner for the acts of the towns-

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[7] It should be noted that while Boyte testified for the Petitioner in the unfair labor practice hearing, Warmath, Cox, White, and Milligan testified for the National Labor Relations Board.

[8] Porter was sent to Warmath's office by the Mayor of Humboldt because of an unreasonable traffic ticket (J. A. 43a); Boyte spoke to Bolin in his office (J. A. 49a); Cox telephoned both Mrs. Cross to see about her ill mother and Stevens (J. A. 52a, 54a); White likewise telephoned Stevens (J. A. 58a); and Milligan saw Cross personally (J. A. 35a).

[9] They no doubt lacked the business association with Warmath. Blankenship was Warmath's banking competitor, and Warmath was not even acquainted with Mills (J. A. 82a).

people in circumstances as this case is to ignore proven and established principles and precepts of agency law.

B. The Court of Appeals found no difficulty in determining that the actions of the townspeople were coercive. Such a finding is squarely in conflict with the First Amendment, Section 8 (c) of the National Labor Relations Act, and the overwhelming weight of authority as set out in the decisions of other courts of appeals.

The cases have clearly and concisely held that the right of free speech guaranteed by the First Amendment and Section 8 (c) of the Act should not be defeated by narrow or strained construction. **Montgomery Ward & Co. v. N. L. R. B.**, 385 F. 2d 760 (C. A. 8, 1967). The cases have further held that for statements to be determined coercive and violative of Section 8 (a) (1) of the Act the evidence must support feelings of coercion and interference on the part of the employee and the employee must consider himself restricted or limited either in his right of self-expression or his freedom to participate in self-organization. **N. L. R. B. v. Howard Quarries, Inc.**, 362 F. 2d 26 (C. A. 8, 1966); **N. L. R. B. v. I. Posner, Inc.**, 342 F. 2d 826 (C. A. 2, 1965); **S. H. Kress & Co. v. N. L. R. B.**, 317 F. 2d 225 (C. A. 9, 1963); **J. S. Dillon & Son v. N. L. R. B.**, 338 F. 2d 395 (C. A. 10, 1964); **N. L. R. B. v. D. Gottlieb & Co.**, 208 F. 2d 682 (C. A. 7, 1953).

Clearly the record in the instant case is completely devoid of threats of reprisal or feelings on the part of the employees contacted that they had been coerced or that their rights of self-expression or self-organization were being impaired. This is true even from the testimony of the employees themselves. Employee Terry Stevens in testifying as to what was said to him by Cox and White, related only that Cox said she would appreciate it if he did not go union because she did not think the Company was ready for it and White asked him not to vote for the

Union (J. A. 45a). These statements of Cox and White in the testimony of Stevens are in no way coercive. Employee Danny Porter's recitation of his conversation with Warmath was equally meaningless and nondescript, for Porter, who again it must be noted went to see Warmath for his own benefit, quoted Warmath as casually asking him if the Union was coming in, and upon his affirmative reply, telling him that the Company did not need a union because the plant had lost money[10] (J. A. 44a). Porter did testify that Warmath said he had done him a favor (fixing the traffic ticket) and now Porter could do him one (J. A. 44a). This is explained uncontradictedly by Warmath as asking Porter not to engage in any labor strife (J. A. 67a). The testimony of the remaining two employees who were spoken to also indicates that they were neither coerced nor threatened. Bolin characterized his discussion with Boyte as "just a natural discussion" in which Boyte wanted to know why the men wanted a union, stated that he did not think a union was needed, and referred to the Humboldt Hosiery Mill and how it was lost. Bolin replied that the men did not have soap and towels, some men could smoke at all times and others could not, some men do not work while others do and draw as much money, there is no place to wash hands which are greasy and nasty, and some men are treated nice and others rough (J. A. 49a, 50a). Bolin neither talked nor testified like a man who was coerced or considered himself limited in his right of self-expression or organization. Employee Cross admittedly never talked to Cox (J. A. 36a) and during his conversation with Milligan arguably maintained his views as to the merits of the Union with complete freedom, telling Milligan that the Company had been brought to Humboldt for cheap labor and that the people in St. Louis were making considerably

[10] It was common knowledge that the Petitioner had lost approximately $100,000.00 during its first year (J. A. 53a).

more money than the Humboldt employees (J. A. 37a). Even at the hearing Cross generalized, "I know any place that's union makes more money than a non-union place" (J. A. 38a).

The above-enumerated instances are the sum and substance of the actions taken by the townspeople as related directly by the employees of the Petitioner. Applying the well recognized tests as set out in **Bourne v. N. L. R. B.**, 332 F. 2d 47 (C. A. 2, 1964), for unlawful interrogation, clearly no violations occurred. In **Bourne**, supra, the following tests are carefully laid out: (1) The background, i. e., is there a history of employer hostility and discrimination; (2) The nature of the information sought, e. g., did the interrogator appear to be seeking information on which to base taking action against the individual employees?; (3) The identity of the questioner, i. e., how high was he in the company hierarchy?; (4) Place and method of interrogation, e. g., was the employee called from work to the boss's office?; and (5) Truthfulness of the reply.

In the instant case there is no history of employer discrimination or hostility; all information sought was merely casual conversation and of little or no value; the townspeople were not even employed by the Petitioner; the place and method were social; and all answers were extremely truthful. Consequently, it is readily apparent that there were no fears of reprisal for lawfully pursuing their Union activities on the part of the employees, N. L. R. B. v. Ralph Printing and Lithographing Company, 379 F. 2d 687 (C. A. 8, 1967).

Nor would any mention of the removal of Humboldt Hosiery Mill from the town be found to be an unfair labor practice, for it is well established that disadvantages of

union representation may be stressed so long as the consequences are ones which have actually occurred or may actually and lawfully take place. **N. L. R. B. v. M & B Headwear Co.**, 349 F. 2d 170 (C. A. 4, 1965).

2. The questions presented are of substantial importance and will have great effect on all future cases with like issues.

The number of industrial plants which have located in small towns across the United States has been increasing, and there is no doubt that said plants immediately become major factors in their town's economic and industrial development and growth. Thus, it is no wonder why the citizens of the towns have such a deep and abiding interest in all that affects the plants, including union organization. It is small wonder the citizens of Humboldt were so concerned because of the violence taking place just 50 miles away in Paris, Tennessee, involving the same Union. It is, therefore, manifestly important that the question of agency and the tests therefore as they pertain to the employer's responsibility for statements of the townspeople be authoritatively settled.

Also there is perhaps no right as precious as that of free speech which should be jealously safeguarded. It is one of the cornerstones on which our country was founded. Clearly, the determination of just what constitutes free speech under the First Amendment and Section 8 (c) of the National Labor Relations Act must of necessity follow certain well-defined rules and treatment thereunder must be uniform. The guidance of this Court is most assuredly needed in the circumstances of this case.

CONCLUSION.

For the foregoing reason, a writ of certiorari should be granted.

Respectfully submitted,

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